FILED
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No. 92-1597

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MARK BERNDT,

Petitioner,

v.

ERNEST A. JACOBI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the First Amendment permit a public employer to retaliate against an employee for filing a federal lawsuit, as long as the lawsuit did not involve a "public concern" under *Connick v. Myers*, 461 U.S. 138 (1983)?

2. Is there a federal remedy when a public employee is disciplined because he filed a federal lawsuit?

3. Is the remedy for retaliation for the filing of a federal lawsuit limited, as the Seventh Circuit held in this case, to "a state law claim or some other grievance procedure?"

INDEX

QUESTIONS PRESENTED 1

OPINIONS BELOW 2

JURISDICTION 3

STATUTES INVOLVED 3

STATEMENT 3

REASONS FOR GRANTING THE WRIT 5

A. The Seventh Circuit's Content Based Standard 6

B. Aside from the Seventh Circuit, the Courts of Appeals Recognize the Same Constitutional Right of Access to the Courts for Public Employees and Prisoners 7

C. The Federal Constitutional Right of Access to the Courts 8

CONCLUSION 10

TABLE OF CASES

Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984) 6, 10

Auriemma v. Rice, 910 F.2d 1449 (7th Cir. 1990) (en banc) 6

Bounds v. Smith, 430 U.S. 817 (1977) 9

Bradley v. Pittsburgh Bd. of Education, 910 F.2d 1172 (3d Cir. 1990) 8

Buise v. Hudkins, 584 F.2d 223 (7th Cir. 1978) 6

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 5

Connick v. Myers, 461 U.S. 138 (1983) 1

Ex Parte Hull, 312 U.S. 546 (1941) 9

Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1986) 6, 8

Harris v. Fleming, 839 F.2d 1232 (7th Cir. 1988) 7

Harrison v. Springdale Water & Sewer Com'n, 780 F.2d 1422 (8th Cir. 1986) 7

Hossman v. Spradlin, 812 F.2d 1019 (7th Cir. 1987) 6

Howland v. Kilquist, 833 F.2d 639 (7th Cir. 1987) 6

Johnson v. Avery, 393 U.S. 483 (1969) 9

Owens v. Rush, 654 F.2d 1370 (10th Cir. 1981) 7

Rice v. Ohio Department of Transportation, 887 F.2d 716 (6th Cir. 1989), *vacated* 110 S.Ct. 3232 (1990) 8

Rizzo v. Dawson, 778 F.2d 527 (9th Cir. 1985) 7

Rutan v. Republican Party of Illinois, 110 S.Ct. 2729, ... 8

Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310 (9th Cir. 1989) 7

Williams v. Lane, 851 F.2d 867 (7th Cir. 1988) 7

Wolff v. McDonnell, 418 U.S. 539 (1974) 9

Yatvin v. Madison Metropolitan School Dist., 840 F.2d 412 (7th Cir. 1988) 6, 8

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MARK BERNDT,

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ERNEST A. JACOBI,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Mark Berndt respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 30, 1992.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-4) is unreported. The decision of the district court (App. 7-21) is reported at 781 F.Supp. 553 (N.D.Ill. 1992).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 5) was entered on October 30, 1992; petitioner's timely petition for rehearing was denied on December 30, 1991. (App. 6.)

STATUTES INVOLVED

This case involves the First Amendment to the Constitution of the United States.

STATEMENT

On January 28, 1991, petitioner, along with his union, Combined Counties Police Association, filed a civil action in the United States District Court for the Northern District of Illinois, *Combined Counties Police Association and Mark Berndt v. City of Evanston,* 91 C 528.[1] (Pet.App. 8) The plaintiffs in *CCPA and Berndt v. Evanston* alleged, *inter alia,* that Evanston had wrongfully disciplined Berndt because he had failed to make an unlawful arrest. (Pet.App. 10.)

On March 15, 1991, after the filing of *CCPA and Berndt v. Evanston,* Evanston's Chief of Police, respondent Jacobi, suspended petitioner for five days for an incident that had occurred on December 10, 1990. (Pet.App. 10.) On July 26, 1991, Jacobi suspended petitioner for thirty days for an

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1. The lawsuit was dismissed on June 12, 1991 and was affirmed by the Seventh Circuit without published opinion on April 27, 1992, No. 91-2554.

incident that had occurred on December 16, 1990. (Id.)

After these suspensions, petitioner filed this action in the district court, alleging that a substantial motivating factor in Jacobi's disciplinary decision was petitioner's status as a litigant in *CCPA and Berndt v. Evanston,* 91 C 528. (Pet.App. 10.) Petitioner alleged that the December 10, 1990 incident did not involve any wrongdoing whatsoever and that Jacobi did not have any legitimate basis to discipline petitioner for that incident. (Amended Complaint, par. 12(a).) Petitioner also alleged that the December 16, 1990 incident had been investigated by two supervisors, who recommended that no discipline be imposed. (Amended Complaint, par. 12(b).) Finally, petitioner alleged that but for Jacobi's desire to retaliate against petitioner, either no discipline or a substantially less severe sanction than a 30 day suspension would have been imposed. (Pet.App. 10.)

Defendant moved to dismiss, arguing primarily that it was not unlawful for Jacobi to retaliate against petitioner for having filed the federal lawsuit. The district court held that petitioner's first lawsuit did not involve a matter of public concern, (Pet.App. 17-20) and dismissed the action on the basis of decisions from the Seventh Circuit limiting retaliation claims to cases where a prior lawsuit had involved a matter of "public concern" under *Connick v. Myers,* 461 U.S. 138 (1983). (Pet.App. 16-17.) The district judge recognized the unfairness of this disposition, stating that it was "most improper for a chief of police to retaliate against a police officer who challenged a suspension imposed on him due to his failure to make an unlawful arrest." (Pet.App. 21.)

On appeal, petitioner challenged the Seventh Circuit's rule that the First Amendment permits a public employer to retaliate against an employee for filing a federal lawsuit, as

long as the lawsuit did not involve a "public concern." Petitioner pointed out that the Seventh Circuit stands along in its harsh retaliation standard, but the court of appeals refused to reconsider its position,[2] (Pet.App. 3-4) and held that because petitioner's first lawsuit did not involve a matter of public concern, petitioner's remedy for the retaliation must be through "a state law claim or some other grievance procedure." (Pet.App. 4.)

REASONS FOR GRANTING THE WRIT

The Seventh Circuit stands alone in limiting the First Amendment's right to petition for redress of grievances to issues of "public concern." With the exception of the Seventh Circuit, the Courts of Appeals uniformly recognize that "[t]he right of access to the courts is indeed but one aspect of the right of petition," *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972), and does not turn on the content of the grievance. The refusal of the Seventh Circuit to provide a remedy for the violation of federal rights permits unconscionable retaliation, provides public employees with less rights than incarcerated felons, and is in direct conflict with decisions in other circuits.

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2. Petitioner argued in that court of appeals that prisoners may bring retaliation suits without regard to the "public concern" of the underlying action. The panel refused to consider this argument, holding that it had been waived because it had not been presented to the district court. (Pet.App. 2.)

A. The Seventh Circuit's Content Based Standard

In *Altman v. Hurst,* 734 F.2d 1240 (7th Cir. 1984), the Seventh Court held that the right of access to the courts protected by the First Amendment only reaches "political expression and not the general right to bring suit in a federal court of law." Id. at 1244 n.10. The court of appeals reaffirmed this position in *Yatvin v. Madison Metropolitan School Dist.,* 840 F.2d 412 (7th Cir. 1988), where the Seventh Circuit held that the First Amendment only protects litigation that raises issues of public significance, contributes to the "marketplace of ideas," enhances "the vitality of public debate" and extends "the range of ideas and opinions in our society." Id. at 419. The Seventh Circuit refused to follow the contrary, "per se rule" that had been applied by the Eighth Circuit in *Greenwood v. Ross,* 778 F.2d 448, 456-57 (8th Cir. 1985).

The *en banc* Seventh Circuit approved the "political expression" standard in *Auriemma v. Rice,* 910 F.2d 1449, 1459 (7th Cir. 1990), where the court permitted a retaliation suit to proceed because the case involved a matter of "genuine public concern . . . regarding the quality of the entire police force of the City of Chicago."

Although the Seventh Circuit has applied a strict "political expression" test to retaliation suits brought by public employees, it has applied a different rule in prisoner cases. See, e.g., *Buise v. Hudkins,* 584 F.2d 223 (7th Cir. 1978), where the Seventh Circuit applied the "well established [rule] that an act in retaliation for the exercise of a constitutionally protected right is actionable under Section 1983 even if the act, when taken for a different reason, would have been proper." 584 F.2d at 229. See also *Hossman v. Spradlin,* 812 F.2d 1019, 1021 (7th Cir. 1987); *Howland v. Kilquist,* 833 F.2d 639, 644 (7th Cir. 1987);

Harris v. Fleming, 839 F.2d 1232, 1236-38 (7th Cir. 1988); *Williams v. Lane*, 851 F.2d 867, 878 (7th Cir. 1988).

The Seventh Circuit stands along in applying a different standard to public employee retaliation suits than to prisoner retaliation suits.

B. Aside from the Seventh Circuit, the Courts of Appeals Recognize the Same Constitutional Right of Access to the Courts for Public Employees and Prisoners

In *Owens v. Rush*, 654 F.2d 1370 (10th Cir. 1981), the Tenth Circuit held that a person who alleged that he had been discharged for assisting his wife in preparing a Title VII charge had stated a First Amendment claim, even if the assistance involved "private and not public activities." Id. at 1379.

The Ninth Circuit followed *Owens v. Rush* in *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985), to hold that "retaliation for assisting with litigation and bringing litigation states a claim." Id. at 531. *Rizzo* arose in a prisoner civil rights case; the Ninth Circuit applied the same rule to a non-prisoner in *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989), holding that the revocation of petroleum distribution license in retaliation for the filing of suit contesting local pollution regulations was actionable under 42 U.S.C. §1983.

The Eighth Circuit has repeatedly held that "state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future." *Harrison v. Springdale Water & Sewer Com'n*, 780 F.2d 1422 (8th Cir. 1986).

See, e.g., *Greenwood v. Ross,* 778 F.2d 448, 456-57 (8th Cir. 1986) (''filing of an EEOC charge and a civil rights lawsuit are activities protected by the first amendment'').

The Third Circuit reached the same result in *Bradley v. Pittsburgh Bd. of Education,* 910 F.2d 1172, 1177 (3d Cir. 1990). There, a school teacher alleged, *inter alia* that she had been harassed after filing a lawsuit. Id. at 1174. The Court held that teacher had stated a claim, concluding that ''[a]lthough most cases concerning retaliation in violation of the right of access to the court have arisen in the prison context, the same principles have been applied in other areas.'' Id. at 1177.

Outside of the Seventh Circuit, and with the exception of a decision subsequently vacated by this Court,[3] the Court of Appeals are in agreement that the right of access to the court is not based on the content of the litigation.

C. The Federal Constitutional Right of Access to the Courts

Prior decision of this Court make plain that, contrary to the view of the Seventh Circuit, the right of access to the courts does not turn on whether a litigant seeks to contribute to the ''marketplace of ideas,'' or enhance ''the vitality of public debate'' or extend ''the range of ideas and opinions in our society.'' *Yatvin v. Madison Metropolitan School Dist.,*

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3. *Rice v. Ohio Department of Transportation,* 887 F.2d 716, 720 (6th Cir. 1989), *vacated [and remanded for reconsideration in light of Rutan v. Republican Party of Illinois, 110 S.Ct. 2729], 110 S.Ct. 3232 (1990).*

840 F.2d 412, 419 (7th Cir. 1988),

The federal constitutional right of access to the courts was developed in prisoner litigation. In *Ex Parte Hull,* 312 U.S. 546 (1941), the Court was confronted with a prison regulation that prohibited prisoners from filing legal documents unless the document had been reviewed and approved by the legal adviser to the parole board. Id. at 548-49. The Court unanimously concluded that the regulation was invalid, holding that "the state and its officers may not abridge a petitioner's right to apply to a federal court for a writ of habeas corpus." Id. at 549.

The Court extended *Ex Parte Hull* in *Johnson v. Avery,* 393 U.S. 483 (1969), to invalidate a prison regulation that prohibited prisoners from serving as "jailhouse lawyers" and assisting in the preparation of petitions for post-conviction relief. Id. at 490. The Court held that the regulation had the effect of "forbidding illiterate or poorly educated prisoners to file habeas corpus petitions." Id. at 487.

The Court extended prisoners' rights of access to the courts to civil matters in *Wolff v. McDonnell,* 418 U.S. 539 (1974). There, the Court was concerned, *inter alia,* with a prison regulation that limited jailhouse lawyers to prisoners approved by the Warden. In holding this regulation invalid in its application to prisoner civil rights cases, a unanimous Court agreed that "[t]he right to access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Id. at 579.

The Court reaffirmed this constitutional principle in *Bounds v. Smith,* 430 U.S. 817 (1977), when it held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation

and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." (footnote omitted) Id. at 828.

Nothing in this Court's prior decisions supports the view of Seventh Circuit, that the right of access to the courts required "political expression." *Altman v. Hurst,* 734 F.2d 1240, 1244 n.10 (7th Cir. 1984). The strict retaliations standard applied by the Seventh Circuit to public employees is a sport in the law that should be overruled.

CONCLUSION

The petition for writ of certiorari should be granted.

March, 1993

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APPENDIX

Arguyed July 8, 1992
Decided October 30, 1992

Before
HON. WALTER J. CUMMINGS, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004

MARK BERNDT,

Plaintiff-Appellant,

v.

ERNEST A. JACOBI,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 91 C 5059 **Brian Barnett Duff,** *Judge.*

Mark Berndt, an Evanston police officer, was taking a coffee break when an unidentified man approached him and tried to surrender. Berndt did not know the man, nor did he know whether the man had committed a crime. For these reasons, Berndt refused to arrest him. Persisting, the man went to the police station and surrendered himself there, complaining of Berndt's refusal to arrest him earlier. As it turned out, there was an outstanding warrant for the man's arrest, and Berndt was subsequently disciplined for not arresting him earlier.

In light of that discipline, Berndt and the police officers' union sued the city of Evanston for promoting a policy of unconstitutional arrests. After that lawsuit was filed Berndt was disciplined again for a different incident. Berndt believed that the second disciplinary proceeding to be in retaliation for the pending lawsuit. This belief led Berndt to file the suit before us now, a 42 U.S.C. § 1983 action for government infringement of Berndt's First Amendment right to sue, as well as the right to speak-out against alleged government misdeeds. The district court dismissed Berndt's lawsuit for failing to show that his "speech" warranted First Amendment protection, stating that it presented an employer-employee dispute, not systemic misconduct.

Berndt makes two arguments on appeal. First, that police officers are denied the same right of access to the courts as is enjoyed by prisoners. This issue was not argued below, and is therefore waived. *Heller v. Equitable Life Assurance Society of the United States,* 833 F.2d 1253, 1261 (7th Cir. 1987). Berndt's next argument in his brief, and the only one remaining for appeal, is that the first lawsuit was a matter of public concern, and therefore is protected by the First Amendment.

When a government employee speaks out, as an employee, about matters of public concern, that speech will be protected by the First Amendment. A primary purpose of the Frist Amendment is to protect speech on public issues. Nevertheless, free speech rights belonging to the government employee will be balanced against the concerns that the government agency be able to efficiently fulfill its public services. *Connick v. Myers,* 461 U.S. 138 (1983), citing *Pickering v. Board of Education,* 391 U.S. 563 (1968). To determine if the speech raises a matter of public concern, the court considers the content, form, and context, as revealed by the entire record. This is a question of law that we review de novo. *Connick,* 461 U.S. at 146-48.

In *Yatvin v. Madison Metropolitan School District,* 840 F.2d 412, 419 (7th Cir. 1988), the plaintiff was a public school principal arguing that she was denied a promotion in retaliation for an earlier sexual harassment complaint she lodged against her employer. She sought Section 1983 redress for alleged violations of her First Amendment rights. We acknowledged that the subject matter of that litigation - sexual harassment - presented a matter of public concern. Upon closer scrutiny, however, we determined that Yatvin's case was simply an employer- employee dispute. Although an alleged police policy of stops and arrest without probable cause could raise a matter of public concern, Berndt's alleged facts did not appear to reflect that situation. Counsel conceded that the specific facts of the first lawsuit did not present a matter of public concern. Instead he argued that the lawsuit itself and the fact that a lawsuit was filed presented a matter of public concern, regardless of the legal or factual content.

This court has considered the question, and determined that not every lawsuit, just by virtue of its existence, presents a matter of public concern. *Yatvin,* 840 F.2d at 419; *Auriemma v. Rice,* 910 F.2d 1449, 1460 (7th Cir. 1990) (en banc), *cert.denied* 111 S.Ct. 2796 (1991). Berndt argues that we should reconsider this decision for policy reasons. First Amendment protection for all lawsuits, Berndt argues, protects the right of access to the courts. Right of access advances important theories and protects citizens' rights to seek redress for their grievances. We stated in *Yatvin* that not all litigation seeks to advance political or other ideas and whether private or public objectives are sought, not all lawsuits raise matters worthy of First Amendment protection. Therefore, First Amendment protection may be available in some cases, but not in all. *Yatvin,* 840 F.2d at 419; *Callaway v. Hafeman,* 832 F.2d 414, 417 (th Cir. 1987). This is a run-of-the-mine single-plaintiff lawsuit that does not seek pervasive or systemic relief, nor does it call to the public

attention allegedly unlawful practices by the city of Evanston. *See Yatvin,* 840 F.2d at 419. Berndt's original suit expressed a personal complaint about internal department procedures - a complaint he now acknowledges was not one of public concern. The First Amendment does not protect Berndt against purported retaliation for filing this lawsuit. He will need to find relief under a state law claim or some other grievance procedure.

For the foregoing reasons, the district court decision is AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004

MARK BERNDT,

Plaintiff-Appellant,

v.

ERNEST A. JACOBI,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 91 C 5059 **Brian Barnett Duff,** *Judge.*

[October 30, 1992]

JUDGMENT — ORAL ARGUMENT

HON. WALTER J. CUMMINGS, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

This cause was heard on the record from the above mentioned District Court and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004

MARK BERNDT,

Plaintiff-Appellant,

v.

ERNEST A. JACOBI,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 91 C 5059 **Brian Barnett Duff,** *Judge.*

[December 30, 1992]

ORDER

HON. WALTER J. CUMMINGS, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Plaintiff-Appellant, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARK BERNDT,

Plaintiff,

91 C 5059 *v.*

ERNEST A. JACOBI, et al.,

Defendant.

MEMORANDUM OPINION

BRIAN BARNETT DUFF, District Judge.

Introduction

Mark Berndt, a police officer employed by the City of Evanston, Illinois, brings this action under 42 U.S.C. s 1983 against Ernest A. Jacobi, Evanston's Chief of Police. His amended complaint asserts that he was disciplined in retaliation for having brought (along with his union) a prior civil rights case against the City of Evanston. According to Berndt, the allegedly retaliatory disciplinary action taken against him violated rights protected by the First and Fourteenth Amendments. Defendant Jacobi has moved under Rule 12(b)(6) to dismiss the complaint. Defendant's motion is granted.

Facts[1]

On January 28, 1991, Berndt and his union, Combined Counties Police Association (''CCPA''), filed a civil action in the United States District Court for the Northern District of Illinois, *Combined Counties Police Association and Mark Berndt v. City of Evanston,* 91 C 528. The complaint in *CCPA and Berndt v. Evanston* alleged that the City of Evanston had adopted a policy that requires its police officers to violate the constitutional rights of citizens.[2]

The plaintiffs in *CCPA and Berndt v. Evanston* alleged the following facts. At approximately 11:45 p.m. on October 29, 1989, a vehicle pulled up to Berndt who was taking a coffee break but who was on duty and in uniform. A man whose identity was unknown to Berndt emerged from the car and, while laughing, asked, ''You looking for me?'' Berndt responded with a question of his own, ''Who are you?'' The man answered, ''You know who I am,'' but Berndt responded that he did no know him.

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1. This review of the facts is culled from the allegations of Berndt's complaint which are taken as true for purposes of this motion. See *Gregory v. Nunn,* 895 F.2d 413 (7th Cir.1990).

2. Judge Williams dismissed the case on June 7, 1991. See Combined Counties Police Association and Mark Berndt v. City of Evanston, No. 91 C 528, slip op., 1991 WL 104139 (N.D.Ill. June 7, 1991) (''Berndt I ''), *appeal pending,* 7th Cir., No. 91-2554. Berndt's amended complaint in this action incorrectly states that a copy of the complaint in *CCPA and Berndt v. Evanston* was attached to it. In fact, the *CCPA and Berndt v. Evanston* complaint was not attached to Berndt's amended complaint. After reviewing the files in the Clerk's Office of the Seventh Circuit Court of Appeals, this court takes judicial notice of the allegations in *CCPA and Berndt v. Evanston* which is currently on appeal.

The stranger then declared, "I'll just turn my own self in," ran back to his car and drove off. Based on that encounter, which took no more than twenty seconds, Berndt did not believe that he had a lawful basis to detain the man.

The man then went to the Evanston police station and surrendered on an outstanding battery warrant. At the police station, he complained that Berndt had refused to arrest him.

Based on that complaint, the Evanston police department accused Berndt of misconduct. Following an investigation, Evanston's Chief of Police concluded that Berndt was guilty of wrongdoing and should be suspended for five days. CCPA, Berndt's union, filed timely grievances on his behalf under its collective bargaining agreement with the city. Evanston's Chief of Police and its City Manager denied the grievances and Berndt and CCPA filed Case No. 91- 528 in federal court.

The *CCPA and Berndt v. Evanston* complaint further alleged that the City of Evanston had adopted an unconstitutional policy. Paragraphs 13 and 14 of that complaint stated:

> 13. By disciplining plaintiff Berndt for failing to detain a citizen in circumstances when a reasonable police officer would not believe that he had a lawful basis to detain, defendant City of Evanston has adopted a policy which, if allowed to stand, will require plaintiff Berndt and other police officer members of the Combined Counties Police Association to violate the constitutional rights of citizens.
>
> 14. Unless restrained by this Court, defendant City of Evanston will continue to discipline police officers who refuse to make unconstitutional detentions of the type described herein, thereby causing irreparable harm to the members of plaintiff CCPA and to persons who [sic] constitutional rights will be violated because of the unconstitutional policy.

As relief, the complaint requested that the "Court issue a permanent injunction prohibiting the City of Evanston from disciplining police officers who refuse to detain a citizen in circumstances where a police officer would not believe that he (or she) had a lawful basis to detain."

Berndt's amended complaint in this action alleges that filing the complaint in *CCPA and Berndt v. Evanston* was part of an overall effort by him and by his union to correct unlawful practices and bring them to public attention. The *CCPA and Berndt v. Evanston* lawsuit was in fact reported in news articles in the Evanston Review, the Evanston community newspaper, and in the Daily Northwestern, the daily newspaper published by students at Northwestern University.

On March 15, 1991, after the filing of *CCPA and Berndt v. Evanston,* Defendant Chief of Police Jacobi imposed a five day suspension on Berndt. This five day suspension was ostensibly for an incident of alleged misconduct that occurred on December 10, 1990. On July 26, 1991 (over a month after Judge Williams dismissed the case), Defendant Jacobi imposed a thirty day suspension on Berndt. The thirty day suspension was said to be for an incident of alleged misconduct that had occurred on December 16, 1990.

Berndt alleges that a substantial motivating factor in Jacobi's imposition of the five and thirty day suspensions was the fact that Berndt was a co-plaintiff in *CCPA and Berndt v. Evanston.* Were it not for Defendant's desire to retaliate, Berndt alleges, there would either have been no discipline imposed or the sanctions would have been less severe.

A. Standard of Review

Defendant Jacobi's motion to dismiss can be granted only if "it appears beyond doubt that the plaintiff is unable to prove any set of facts which would entitle the plaintiff to relief." *Ellsworth v. City of Racine,* 774 F.2d 182, 184 (7th Cir.1985). Only if the allegations of the complaint, and all

reasonable inferences drawn therefrom, could not support any cause of action may this court grant a motion to dismiss. Id.

B. Identifying the Right at Stake: Substantive Due Process

Defendant Jacobi argues in his briefs that Berndt's complaint should be dismissed because the challenged suspensions did not deprive Berndt of a protected property interest and because Berndt allegedly has an adequate state remedy by way of administrative review of the suspensions. These arguments incorrectly presume, however, that Berndt is claiming the infringement of procedural due process protections. In fact, Berndt is charging the Defendant with a violation of substantive due process.

Berndt claims that by retaliating against him for filing the prior lawsuit against the City of Evanston, Defendant Jacobi has violated his First Amendment rights. The First Amendment applies to the states through the substantive component of the Fourteenth Amendment's due process clause. See *Altman v. Hurst,* 734 F.2d 1240 (7th Cir.1984); *Brown v. Brienen,* 722 F.2d 360, 366 (7th Cir.1983).

Defendant is correct that, were this a procedural due process case, the relevant inquiries would be whether Berndt was deprived of a protected liberty or property interest, and if so, whether the process available to contest the deprivation was "due." *See Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Under that analytic approach, there is indeed considerable authority to support Jacobi's argument that Berndt lacks a property interest in his employment as an Evanston police officer. *See Berndt I* (Berndt lacked a property interest); *Davis v. City of Chicago,* 841 F.2d 186, 188 (7th Cir.1988) (no general property interest under Illinois law in public employment); *Hershinow v. Bonamarte,* 735 F.2d 264 (7th Cir.1984) (suspension of police officer did not implicate a protected liberty or property interest).

Defendant Jacobi also argues that the process available is "due," contending that Berndt has adequate state remedies including the review of disciplinary proceedings before the Evanston Civil Service Commission and under the administrative review law of Illinois, Ill.Rev.Stat., ch. 24, P 10-1-45. He relies on *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), and *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) in making the argument that the availability of post-suspension remedies satisfies due process. As mentioned above, however, the availability of post-suspension remedies is not relevant in determining whether substantive due process has been violated. *See Hudson v. Palmer,* 468 U.S. at 541 n. 4, 104 S.Ct. at 3208 n. 4 (Stevens, J., concurring in part) (majority's analysis of availability of post-deprivation remedies does not apply to conduct that violates a substantive constitutional right, "actions governmental officials may not take no matter what procedural protections accompany them"); see also *Parratt v. Taylor,* 451 U.S. at 546, 553, 101 S.Ct. at 1918, 1921 (Powell, J., concurring).

The Seventh Circuit has made plain that the availability of post- deprivation remedies is not germane to violations of particular substantive provisions of the Constitution. In *Sizemore v. Williford,* 829 F.2d 608 (7th Cir.1987), an inmate in a federal prison alleged that the prison's withholding delivery of newspapers to which he subscribed violated his First Amendment rights. The Seventh Circuit reversed the district court which had ruled under *Hudson* and *Parratt* that the availability of the Federal Tort Claims Act (a post-deprivation remedy) precluded the prisoner's action. Emphasizing that the prisoner's case was brought under the First Amendment rather than under procedural due process, the Seventh Circuit wrote:

> *Parratt* is . . . not applicable to instances where the substantive guarantees of the Constitution are alleged to be violated, as opposed to alleged violations of

> procedural due process.' Thus, despite the government's contrary assertions, the separate and independent existence of [the prisoner's] First Amendment claim is in no way affected, let alone precluded, by the availability of alternate procedural remedies fully adequate to afford Sizemore due process of law for a deprivation of personal property.
> Id. at 611 (emphasis supplied), in part quoting *Wolf-Lillie v. Sonquist,* 699 F.2d 864, 872 (7th Cir.1983).

The Fifth Circuit has stated the irrelevance of available procedures and remedies to violations of substantive due process in similarly powerful and unambiguous terms:

> [W]hen a plaintiff alleges that state action has violated an independent substantive right, he asserts that the action is unconstitutional. If so, his rights are violated no matter what process precedes, accompanies, or follows the unconstitutional action.
> *Schaper v. City of Huntsville,* 813 F.2d 709 (5th Cir.1987), quoting *Augustine v. Doe,* 740 F.2d 322 (5th Cir.1984).

C. Elements of a First Amendment Violation

Ever since *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), "it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708 (1983). The fact that the public employee lacks tenure, i.e., lacks a property interest in his employment, makes no difference if his public employer has made an adverse employment decision based on the employee's exercise of a first amendment right.

In *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), a school

district decided not to rehire an untenured high school teacher. The untenured teacher, Doyle, alleged that he was not rehired because of certain constitutionally protected statements that he made to a radio station. The Supreme Court stated:

> Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, *Board of Regents v. Roth,* 408 U.S. 564 [92 S.Ct. 2701, 33 L.Ed.2d 548] (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedom.

Id. at 283, 97 S.Ct. at 574.[3] Judge Williams' decision that

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3. The fact that a public employer may not deny an employment benefit to an employee because of that employee's exercise of free speech even though it could have denied the benefit for "no reason whatever" is an example of the mysterious doctrine of unconstitutional conditions. "The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt." Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv.L.Rev. 1415 (1989). The doctrine of unconstitutional conditions has recently been the subject of a great deal of scholarly inquiry. See id; see also Richard Epstein, The Supreme Court, 1987 Term--Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102

Berndt lacks a property interest in his position as an Evanston police officer thus has no bearing on the issue this court must decide. *See Berndt I.*[4]

Although a public employee may not be punished for constitutionally protected speech, not everything a public employee says is protected. Courts reviewing free speech cases brought by public employees must strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers,* 461 U.S. at 142, 103 S.Ct. at 1687, quoting *Pickering v. Board of Education,* 391 U.S. at 568, 88 S.Ct. at 1734. In *Connick,* the Supreme Court ruled that only if the public employee's expression "constitutes speech on a matter of public concern," is the employee protected from the denial of otherwise unprotected employment benefits. Id.461 U.S. at 146, 103 S.Ct. at 1689. If the public employee's expression does not relate to a matter of public concern, "it is unnecessary . . . to scrutinize the reasons" for the particular employment decision taken. Id.

Harv.L.Rev. 4 (1988).

4. In addition, the court finds irrelevant the fact that Berndt did not actually lose his job but was "merely" suspended instead. In *Altman v. Hurst,* 734 F.2d 1240, 1243 (7th Cir.1984), the Seventh Circuit rejected a police sergeant's First Amendment claims on many grounds including the fact that he was merely complaining of harassment and that he had been neither "fired nor suspended " for his allegedly protected speech. (emphasis supplied).

Berndt argues that his now-dismissed lawsuit against the City of Evanston was expression protected by the First Amendment. Several Supreme Court cases do indicate that the First Amendment protects certain forms of litigation. See *Bates v. State Bar,* 433 U.S. 350, 376 n. 32, 97 S.Ct. 2691, 2705 n. 32, 53 L.Ed.2d 810 (1977), *reh. denied,* 434 U.S. 881, 98 S.Ct. 242, 54 L.Ed.2d 164 (1977); *NAACP v. Button,* 371 U.S. 415, 429, 83 S.Ct. 328, 335, 9 L.Ed.2d 405 (1963). In *Button* the Court held that the NAACP's recruitment of prospective plaintiffs for civil rights litigation was protected under the First and Fourteenth Amendments. Commenting on the NAACP's use of litigation, the Supreme Court wrote:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment by all government, federal, state and local, for members of the Negro community in this country. It is thus a form of political expression.

Id.

The Seventh Circuit has stated that "[a] close reading of [*Bates* and *Button*] clearly shows that the Court was concerned about political expression and not the general right to bring suit in a federal court of law." *Altman v. Hurst,* 734 F.2d 1240, 1244 n. 10 (7th Cir.1984). Furthermore, according to the Seventh Circuit, its interpretation of those cases "dovetails with the Connick rule that limits the first amendment protection given public employees to pronouncement on public issues. Thus, a private office dispute cannot be constitutionalized merely by filing a legal action." Id. Therefore, if Berndt's prior lawsuit against Evanston, *CCPA and Berndt v. Evanston,* was a matter of "public concern," then his bringing that action was protected by the First Amendment; otherwise it was not. *See Yatvin v. Madison Metropolitan School*

Dist., 840 F.2d 412 (7th Cir.1988).

D. Berndt's Prior Lawsuit Was Not a Matter of Public Concern

In his amended complaint in this action, Berndt alleges that his prior suit "sought relief against systemic misconduct and was part of an overall effort by Berndt and the Combined Counties Police Association to correct allegedly unlawful practices and to bring them to public attention." Amended Complaint P 7. According to Berndt, the claim presented in *CCPA and Berndt v. Evanston* brought to the public's attention the charge that Evanston had adopted a policy requiring its police officers to arrest citizens without adequate cause in violation of the Fourth Amendment.

Berndt's bold assertions about Evanston's "systemic misconduct" are utterly disproportionate to the actual facts that he can conjure up to allege in support. Judge Williams so observed in her opinion dismissing the prior suit against the City of Evanston. That suit was dismissed in part because there were insufficient allegations of a pattern of wrongdoing on the part of the city. The judge wrote:

> [T]he plaintiffs [CCPA and Berndt] fail to allege that the defendant had a policy, or engaged in a pattern, custom or practice of unconstitutional conduct by forcing police officers to make unconstitutional stops. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 691-94 [98 S.Ct. 2018, 2036- 38, 56 L.Ed.2d 611] (1978). This lawsuit is based on one instance where disciplinary action was carried out against officer Berndt because he failed to stop a citizen. There is no suggestion that any other officers in the department were ever reprimanded for failing to make unconstitutional stops. The court notes that plaintiffs appear to concede these arguments, since they ignored them in their response to the motion to

dismiss.

Berndt I at 4. Later, discussing CCPA's and Berndt's lack of standing to raise jus tertii arguments on behalf of Evanston's citizens, the opinion states that "plaintiffs have not shown continuity of defendant's alleged illegal conduct. In fact out of the entire class of plaintiffs, only Berndt claims that he has actually suffered an injury because of the defendant's conduct." Id. at 6.

A public employee can not convert a private dispute with his employer into a matter of "public concern" by dressing up that dispute with wild assertions about "systemic misconduct." The fact that even a single police officer might be disciplined for his refusal to violate the Constitution is, of course, highly improper. If anything, a police officer should be commended, not disciplined, for his fidelity to the Constitution.

A lawsuit over the single incident alleged in *CCPA and Berndt v. Evanston,* however, does not rise to the level of "public concern" necessary to trigger First Amendment protection under *NAACP v. Button* and *Connick v. Myers.* As mentioned above, Berndt has failed to allege that Evanston's "systemic misconduct" consisted of more than a single occurrence.

The Seventh Circuit has stated that for a lawsuit by a public employee to be protected under the First Amendment, it must be "part of an overall effort to correct allegedly unlawful practices or to bring them to public attention." *Yatvin v. Madison Metropolitan School Dist.,* 840 F.2d 412, 418 (7th Cir.1988). "Relief must be sought against pervasive and systemic misconduct by public officials." *Auriemma v. Rice,* 910 F.2d 1449, 1460 (7th Cir.1990).

In *Yatvin,* a principal of a public school charged that the denial of two promotions she sought violated her rights under Title VII and the First and Fourteenth Amendments. She

claimed that she was turned down the first time because she was a woman and the second time in retaliation for her action in filing sex discrimination charges growing out of her first application.

Yatvin's First Amendment claim was held to be foreclosed by her inability to distinguish her case from the "run-of-the-mine single-plaintiff discrimination case." Id. at 420. Distinguishing Yatvin's suit from the NAACP's efforts in *Button,* the Seventh Circuit wrote further:

> [Yatvin's] lawsuit does not seek relief against pervasive or systemic misconduct by a public agency or public officials, and unlike the NAACP's litigation against school segregation, is not part of an overall effort by the plaintiff or by persons or groups allied with her to correct allegedly unlawful practices or bring them to public attention.

Id.

Similarly, Berndt has not distinguished his lawsuit against the City of Evanston from a routine "unfair discipline of a police officer" case. Inasmuch as Berndt has failed to back up his assertions regarding Evanston's alleged "systemic misconduct," his prior suit would not have helped or hurt anyone else in the world in a degree greater than the deterrent effect that every lawsuit has. By referring to Yatvin's case as "run-of-the-mine," the Seventh Circuit apparently requires that public employee lawsuits must directly affect a good number of people other than the actual litigants in order to qualify as a lawsuit of "public concern." *Cf. Auriemma v. Rice,* 910 F.2d 1449, 1460 (7th Cir.1990) ("The present case . . . is one of potentially broad impact not only upon the multiple plaintiffs but also upon the public's welfare and safety.") Berndt's prior suit was thus not a matter of "public concern" sufficient to trigger the First Amendment protections afforded public employees.

As in this case, the plaintiff in *Connick v. Myers* engaged in expression which contained elements of both public and private concern. In *Connick,* an assistant district attorney was fired for insubordination for distributing a questionnaire to other attorneys in the office. The questionnaire concerned the office's transfer policy, office morale, the need for a grievance committee, the level of confidence in the attorneys' supervisors and whether employees felt pressured to work in political campaigns. Although the last issue was found to be a matter of "public concern," the Court nevertheless concluded that the questionnaire, on the whole, did not involve speech of public concern. In its view, "her survey . . . is most accurately characterized as an employee grievance concerning internal office policy." *Connick,* 461 U.S. at 154, 103 S.Ct. at 1693. Similarly, Berndt's prior lawsuit "is most accurately characterized" as an "employee grievance" that conveys no more than that a single employee was wronged.

The only Seventh Circuit case Berndt cites in support of his argument that his prior lawsuit was a matter of public concern is *Auriemma v. Rice,* 910 F.2d 1449 (7th Cir.1990). *Auriemma,* however, is easily distinguishable from Berndt's prior lawsuit. *Auriemma* dealt with questions regarding the quality of the entire police force of the City of Chicago. In *Auriemma,* the plaintiffs alleged that wholesale changes in the highest police echelons had been made solely on a racial basis rather than on merit. Unlike Berndt's suit against Evanston, *Auriemma* actually dealt with pervasive and systemic misconduct, misconduct that could have endangered the public safety of a large metropolitan area.

Although Berndt's amended complaint does not rise to the level of "public concern," the court takes note of the moral strength of Berndt's position. Accepting Berndt's version of the facts as true, the court finds it most improper for a chief of police to retaliate against a police officer who challenged a suspension imposed on him due to his failure to make an unlawful arrest. The issue before this court,

however, was whether Berndt had made out a cause of action under the First Amendment. The court is unaware of any statutory cause of action Berndt might have and none was brought to the court's attention.

Conclusion

For the foregoing reasons, Defendant Jacobi's motion to dismiss is granted.